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N. Mishina

Ph.d. (Law Sciences), assistant professor,
Odessa National Law Academy, Constitutional Law Department

LOCAL GOVERNMENT AND THE DOCTRINE OF SEPARATION OF POWERS

Nowadays the municipal reform as the part of the administrative reform is being carried out in Ukraine and many efforts are being taken to increase the efficiency of the local government. To achieve this goal some researchers recommend that the doctrine of separation of powers should be applied to the local government.

In fact, currently a few Ukrainian authors are investigating thoroughly this problem. But such phrases as "the legislative and the executive branches of municipal power" [1,2], "the representative and the executive branches of local government" [3] give reason to consider that some researchers think the doctrine of separation of powers could work when it refers the municipal power.

But thesaurus of the works of M.P.Orzikh [4], I.M.Vail and V.V.Smirnov [5], other scientists shows opposite points of view. N.I.Kornienko is among these authors — he thinks that "on the local government level the doctrine of separation of powers doesn't works". But he doesn't deny "the advisability of the rational separation of functions in the local government system between it's representative and executive parts, if the unity of these parts will be ensured" [6].

I.V.Kozura and O.U.Lebedinska characterising a municipal council, describe it as a collegial, representative (in American interpretation — legislative) body [7]. Indeed, "it is safe to say that a respect for the principle of separation of powers is deeply ingrained in every American. The nation subscribes to the original

premise of the framers of the Constitution that the way to safeguard against tyranny is to separate the powers of government among three branches" [8].

Likely due to this fact the doctrine of separation of powers is mentioned rather often in the acts of the US states and in the local acts concerning municipal government. "The separation of powers ... applies to municipal government in the following manner: the mayor/city manager and operating departments compare to the federal executive branch (President); the city council compares to the legislative branch; and the municipal court compares to the judicial branch. Each of these branches must operate independently of each other" [9].

Sometimes even four branches of power on the municipal level are distinguished. Noblesville Code of Ordinances, § 30.01, stipulating the organization of city government, sets that the government of the city shall consist of four branches, those being the following: (A) executive branch, (B) legislative branch, (C) fiscal branch, (D) judicial branch [10].

According to the Carmel, Indiana City Code the government of the City of Carmel shall consist of four (4) branches, those being:

- executive branch (the Mayor is the City executive and head of the executive branch);
- legislative branch (the legislative branch of the City is the Common Council);
- fiscal branch (the Clerk-Treasurer is the fiscal officer of the City and the head of the fiscal branch);

— judicial branch (City Court of Carmel) [11].

But more often acts of this type distinguish separate three branches of power. For example, San Francisco Charter stipulates the existence of the legislative branch, the executive branch and the judicial branch; the judicial branch includes Superior and Municipal Courts [12].

Certainly the proposition to apply the doctrine of separation of powers to the local government is very attractive. Mostly because of the fact that the concept determining that the legislative, executive, and judicial branches of power ought to be separate and distinct, "is a method of removing the amount of power in any group's hands, making it more difficult to abuse" [13]. The accumulation of all branches of power, legislative, executive, and judiciary, in the same hands whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny [14].

Nevertheless it appears that it's impossible to apply the doctrine of separation of powers to the local government. In order to make this doctrine work effectively, three branches must be rather independent and, which is more important, to have the same nature (for example, all of them must belong to the state power, or all of them must belong to the municipal power). And the courts are always the parts of the state (in the federal countries, for example, in the USA — of the state or federal) system.

"Although the municipal court is created by state statute, it is also a part of the city government" [15]. But also (and first of all!), as it have been mentioned above, it is the part of the corresponding state or federal system. No matter that "municipalities have wide latitude in prescribing the organizational structure of the court. Home rule cities ... have been empowered to enact charter and ordinance provisions ... which prescribe structural details of local court organization. The judge is appointed by the city council and is generally responsible for presiding over trials and other court pro-

ceedings, for conducting various magisterial functions of the court and for the general administration of the court. ... Court clerks are usually appointed by the city council and are responsible to the judge for direction in matters pertaining to overall court policy and judicial procedures ... and performing other duties as may be outlined in the city charter or ordinances" [16].

So it seems one could think that the doctrine of separation of powers can not be applied to the local government. Though writing about this doctrine, Aristotle, in the Politics, spoke about "the city", it is obvious that it was about the "city-state", or the polis of ancient Greece [17]. Charles Montesquieu researched legislative, executive and judicial power concerning monarchical and republican government [18]. The founding fathers mentioned "the federal judicature" (Alexander Hamilton) [19], "republic, commonwealth, popular state" (John Adams) [20] and the doctrine of separation of powers. A.A.Mishin studying the doctrine of separation of powers using the USA model wrote: "the doctrine of separation of powers in it's practical embodiment is structural and functional definity of every of the supreme bodies of the state power; the degree of this embodiment depends on it's formal and legal status and on actual delimitation of the functional and subject jurisdiction [21].

Some Ukrainian authors [22, 23, 24] does not include judicial branch of power while proclaiming the possibility to use of the doctrine of separation of powers on the municipal level. Among the charters, codes of the US municipalities there is also a group of acts that mention only two branches of power — legislative and executive. For example, Salt Lake City (Utah) Code sets, that the municipal government of the city is divided into separate, independent and equal branches of government:

— A. The executive branch, which consists of the elected mayor of the city, and the administrative departments of the city, together with department heads, officers and employees; and

– B. The legislative branch, which consists of a municipal council and their staff. [25].

According to the City of Albuquerque Code of Ordinances, the legislative authority of the city shall be vested in a governing body which shall constitute the legislative branch of the city and shall be known as a Council. The Mayor shall control, direct and organize the executive branch of the city [26]. Greenfield Code of Ordinances includes the thesis that the city government shall consist of two branches, those being the following: (A) Executive Branch, (B) Legislative Branch. All powers and duties of the city that are executive or administrative in nature shall be exercised or performed by the Mayor, another city officer, or a city department. The legislative branch of the city is the Common Council [27]. Sometimes the executive branch is called “the administrative branch” or “the executive and administrative branch” [28].

Some researchers see the problem in the fact that the local government's structure “does not allow for clear separation of the legislative and executive functions and thus does not provide for clear separation of powers” [29]. Among the examples they mention organizational models that allow the municipal council to elect the mayor of council's members and “the impossibility of true separation in any system where the members of the executive are drawn from the legislature” [30].

In spite of this it appears that the principal problem is not the elimination of clear boundaries between the executive and the legislative branches (this tendency can be noticed also in the state power), but the absence of the “judicial branch”. As the basic task of branches is to make the law for the legislative branch, to enforce the law for the executive branch and to interpret the law for the judicial branch, the judicial branch of power seems to be essential in the doctrine of separation of powers. If there are two branches only, it is not the doctrine of separation of powers in its modern interpretation. Besides if each of the three

branches check the other two, the efficiency of the doctrine is the highest.

But basic ideas of the system of checks and balances may be used in the local government. They can be applied to the municipal bodies that are vested with the representative or executive functions. Unfortunately without the third group of municipal bodies the efficiency of the system of checks and balances will decrease greatly.

Thus it appears that taking into account the local government nature, the doctrine of separation of powers in its contemporary interpretation can not be applied to the local government in any modern state. The main reason is the absence of the independent judicial branch of municipal power. But it is possible to discuss the borrowing of the basic principles of the system of checks and balances and their adaptation to the local government.

As for the perspectives of the further researches, it would be advisable to study how exactly the ideas of the system of checks and balances are used in the local government of the foreign countries. It will give the possibility to use proper experience in the creation of “the distinctive system of checks and balances on the local level” [31] in Ukraine.

На сучасному етапі в Україні триває муніципальна реформа; багато уваги приділяється підвищенню ефективності функціонування органів місцевого самоврядування. Для досягнення цієї мети деякі вчені пропонують застосовувати теорію розподілу влад до місцевого самоврядування. Проте на рівні окремих монографій, статей ця проблема не досліджується. Цю статтю присвячено аналізу можливості використання теорії розподілу влад на рівні місцевого самоврядування (переважно на прикладі муніципального управління в США). У висновках наводяться аргументи на користь того, що теорія розподілу влад в її сучасному вигляді не може бути застосована до місцевого самоврядування. Але уявляєть-

ся, що є можливою адаптація до нього деяких елементів системи стримань та противаг. Як перспектива подальших розвідок у даному напрямку пропонується вивчення використання ідей системи стримань та противаг у місцевому самоврядуванні зарубіжних країн, що у подальшому надасть можливість використання відповідного досвіду в Україні.

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